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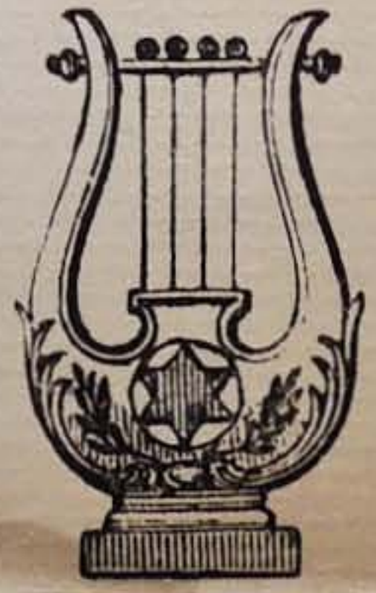
AN ANSWER TO THE ARGUMENT OF THE MANUFACTURERS OF PHONOGRAPHS AND OTHER MECHANICAL REPRODUCTION DEVICES



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AN ANSWER TO THE ARGUMENT OF THE MANUFACTURERS OF PHONOGRAPHS AND OTHER MECHANICAL REPRODUCTION DEVICES

To the Members of the Sixtieth Congress:

You have received numerous letters and pamphlets from manufacturers of piano players and music rolls, and manufacturers of talking machines, etc., in regard to copyright legislation to come up before this session of Congress.

If you have carefully read these letters and pamphlets, you will note that there is but one statement that seems like an argument which they set forth in opposition to the Kittredge Bill introduced in the Senate last year, or a like bill which will be introduced this year in both Senate and the House. The paragraphs in question in the bills introduced at last session were par. G of Sec. 1 of Senate Bill 6330 and Sec. 1, par. E of Senate Bill No. 8190.

These paragraphs, in short, declared that the copyright secured by the act, shall include the ex-

clusive right to the author and composer "To perform the copyrighted work publicly for profit, and to make any rearrangement or resetting of it, or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced."

The manufacturers of phonographs and music rolls oppose the above paragraph for one reason alone, *i. e.*, that if such a bill is passed it will create a monopoly.

This alleged monopoly, they claim, is the result of contracts entered into in 1902 between certain Music Publishers and the Aeolian Company giving to that corporation a monopoly of the manufacture of perforated music rolls and that this combination would be aided by the enactment of a provision such as quoted above.

It is important to remember that when this monopoly claim is made, the manufacturers mention only the Aeolian Company. The Aeolian Company makes perforated music rolls *exclusively*, which leaves the field of phonograph cylinders and gramophone discs, by far the largest and most extensive field of all, still un-"monopolized." When you consider that the strongest opposition is being made by the manufacturers of these gramophone and phonograph records, it must be apparent to all that the fight is not against monopoly but against the paying of royalty, or any remuneration, to the author and composer.

Long before any contracts were closed with the Aeolian Company—as far back as 1888 and 1889—before it was possible to use the Aeolian Company's contracts as a subterfuge for crying "monopoly," the talking machine manufacturers were approached on behalf of the author and composer and asked to pay royalty, which they flatly refused to do; thus proving beyond peradventure that they are not sincere when they cry "monopoly."

But to explain further why these pirates make their claim, I will give our version why and for what consideration certain contracts were signed with the Aeolian Company. Let us delve into a few facts of the past few years and we are convinced we can change the aspect of their argument.

In or about the year 1885, mechanical instrument concerns began to take advantage of reproducing popular music. The publishers at that time thought that the reproduction of this music was a usurpation of their rights and protested (as above mentioned) but in vain. The Aeolian Company, one of the first in this new field, realized that this was a mooted question, and were afraid that if it were thrashed out in the courts, they might get an adverse decision. No single composer, author or publisher had the means to carry on such a litigation. In 1902, an agent of the Aeolian Company went to some of the publishers and suggested that if they would be willing to make a contract with the Aeolian Company,

granting it the right to reproduce the compositions of the publishers for a *limited period* upon the payment of royalty for each roll sold, it would conduct an action and pay *all* of the expenses of same for the sole purpose of securing a decision in the Supreme Court of the United States to prove that the present copyright laws applied to the *perforated rolls*. (By the way, they have already expended between forty and fifty thousand dollars on this.)

This proposition naturally appealed to the publishers, for at that time the composer and publisher were getting absolutely nothing from these manufacturers for using their copyright compositions, to popularize which they were spending thousand of dollars, with no prospect of remuneration in view. Is it not natural that the publisher jumped at the chance of realizing something for his efforts in popularizing his compositions, and thereby also benefitting his author and composer? Would it seem reasonable that any of those publishers contemplated a monopoly?

The contracts were made in the open and the terms were carried out by a suit being brought known as the White-Smith Company *v.* the Apolla Company.

The Apolla Company retained Charles E. Hughes (now Governor of New York), and the law firm of Dickinson, Brown, Ragner & Binney and other able counsel and the case is still pending undecided in the United States Supreme Court.

Now, where is the monopoly?

1. These contracts are for a limited time, five or ten years and *emphatically* not thirty-five years as the opposition claim. Some of them run for five years only and will soon expire.

2. The proposed legislation is not retroactive. It will affect *only* such compositions as are copyrighted from the date of the enactment of the law. The contract in question can affect rights only that shall be held to exist under the present statute, and only those rights which the publishers *actually control.*

3. This contract can only affect the rights in so far as they may be controlled by the limited number of publishers who are parties to the agreement. The publishers who are parties to this contract are only a very small percentage of the publishers doing business to-day.

4. The composers and authors were not a party to the contract in any way, hence *where is the monopoly* boasted of by the manufacturers of the publishers controlling the product of the brains of our authors and composers who want and should have the right to say whether their works shall be reproduced or not?

5. Mechanical rights under the bill in question would be a separate estate subject to assignment, lease, license, gift, bequest, or inheritance. It would accordingly be as impossible for the publishers to obtain control of this estate in any new copyrighted composition as it would be in the

stage producing rights that composers now reserve, unless the publishers *obtain from the composer a new contract, to that effect.*

6. The music publishers, in order to show their absolute good faith in entering into this contract, are even willing that a clause should be enacted into the copyright bill making it impossible to carry out the monopoly that the opposition complain of, and if necessary, add criminal provisions for the observance of the proposed clause of the bill, making it a criminal offense to create a monopoly in copyrighted works. Does this look as though the publishers are anxious to create a monopoly? Does it look as though it is *possible* for them to create a monopoly? Any sane, reasonable man can not help but see the puerility of such an argument as the opposition propose.

Why do they not discolse the *consideration* of that contract which they allege will cause a monopoly?

When they present their argument, why do they wish to cover up half of the facts and thereby mislead the members of the Senate and House and also the public and try to create an erroneous impression as the attitude of the music publishers and composers in relation to copyright legislation?

This seems to be their only argument; if it is, it is a poor one and will not stand. No publisher contemplated the creation of any monopoly and any publisher who made a contract with the Aeolian Co.,—and they are indeed but a small percent-

age of the whole,—it was made with an entire innocence of any intent to do wrong but was simply to get the Supreme Court to pass upon the question whether the present laws were broad enough to protect the composer and his property.

I think the above facts completely answer the point which the opposition wishes to make and I wish to state in brief just a few reasons why the Kittredge bill introduced at last session or a like bill to be introduced at this session should be passed.

The present condition of the law does not encourage the composers. A new practice of exploiting their works has come into use and bids fair to outstrip the old style of sheet music; but while their rights in sheet music are *recognized and remunerated,* they must stand by helpless and see millions of automatic records sold without their leave, and without their right to a share of the profits being admitted.

Original composition has not in any way been stimulated by the manufacturers of automatic devices, simply because no manufacturer will engage composers to write music and spend the money required to popularize it, when other manufacturers can appropriate the same for his own device without paying to the composer a remuneration.

It seems obvious that if the musical composition is entitled to protection, it is not only against the reprinting of a musical score, but against any reproduction of the composer's work.

The musical composer's work is meant to be uttered in sound, and when science discovers a method of reproducing that sound, thus taking possession of the very soul and essence of a composer's work, the composer is entitled to protection against this new form of appropriation, just as much as he is entitled to protection against an illegal performance on a stage of his work.

Let it be hoped that each member of the Senate and House of Representatives will take this matter up, study both sides of the question, and vote for a bill at this session that contains a paragraph giving the author and composer the exclusive right to his work such as paragraph E contained in the bill introduced in the Senate at last session by Mr. Kittredge, so that the composer can deal independently, if necessary, with the mechanical instrument manufacturer as he does with the publisher and producer.

Only that is asked which is fair and just. A law that shall not admit the indiscriminate appropriation of the property of another for profit.

The writer is not a publisher nor an author or composer of note, but knowing the facts on both sides of this question, takes the liberty of setting forth the foregoing, in justice to the music publishers and the authors and composers, and with the hope that the suggested copyright legislation will go a long way toward the encouragement and uplifting of our music throughout the nation.

HARRY D. KERR.